No. 05-1554

Supreme Court, U.S.
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In The

# Supreme Court of the United States

BRENDA BOYNTON,

*Petitioner,*

v.

WESTERN WYOMING COMMUNITY COLLEGE,

*Respondent.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit**

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PATRICK E. HACKER
*Counsel of Record*
PATRICK E. HACKER, P.C.
2515 Pioneer Avenue
Cheyenne, Wyoming 82001
Telephone: (307) 778-8844
*Attorney for Respondent*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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## BRIEF IN OPPOSITION

Respondent Western Wyoming Community College respectfully requests the Court deny the Petition for a Writ of Certiorari in its entirety.

## COUNTER STATEMENT OF THE CASE

### I. FACTUAL BACKGROUND

Pursuant to Supreme Court Rule 15, Respondent provides this statement to correct inaccuracies in the Petition. The Petition misstates the record and the reasoning of the Tenth Circuit Court of Appeals and District Court for the District of Wyoming. The Petition's factual statement begins by confusing two different positions held by Petitioner and by blurring the timeline of events. Brenda Boynton was hired December 1, 1997 to work as a custodian at the Rock Springs, Wyoming, campus of Western Wyoming Community College (WWCC). During her time in *that* position, she received the favorable comments quoted in the Petition. On August 10, 1998, she was promoted to a new position of Maintenance/Custodian at a different campus in Green River, Wyoming. That position involved significantly different duties including building security, plowing and sanding the entrance and parking areas, and interacting with the public to set up rooms for specialized classes and functions. In the new position, Boynton was initially given satisfactory evaluations, with notations that she was learning a new job and that improvement with time was expected in certain areas, including productivity and communications with others. As early as October 10, 1998, nearly two years before Brenda Boynton first alleged sexual harassment,

her evaluation plainly stated that, "Brenda's communication skills do need to be improved." The theme that she needed to improve and was being given time to learn and meet the job standards was continued throughout her evaluations which predate the sexual harassment complaint which is the alleged basis of retaliation.

When Brenda Boynton became pregnant, she was permitted to take maternity leave. In September 2000, shortly before her return to work following maternity leave, Boynton met with College President Tex Boggs, and asserted that her supervisor, Gary Bussart, had sexually harassed her two years earlier when she had worked in her previous position in Rock Springs, Wyoming. Boggs immediately requested the Dean of Administration, Marty Kelsey, to meet with Boynton to discuss the accusations and investigate. Kelsey met with Boynton, and then interviewed all of the persons whom Boynton suggested might have knowledge. Bussart strongly denied the accusations. Other witnesses with whom Boynton claimed to have discussed the issue denied such conversations had occurred. Kelsey chose to go beyond the persons identified by Boynton to also inquire of the administrative director of the Green River Center, Mary Ann Huebner, as to whether she had ever observed any conduct on the part of Bussart that appeared questionable, or whether any complaints or concerns had been voiced about Bussart. Kelsey deliberately did not inform Ms. Huebner that Boynton had made a complaint, or that a sexual harassment complaint had been made.

Kelsey completed his investigation and on October 9, 2000 wrote a letter to Boynton explaining that Bussart had directly disputed her accusations, that the other witnesses she said she had spoken to about the matter had

no recollection of the conversations she claimed, and that he could not confirm the accusation. His letter invited Boynton to supply any other information she could so that he could investigate further, and noted that he had gone as far as he could go, based on the information he had received at that point. Boynton did not follow up further with Kelsey.

The Petition makes much of the timing of an evaluation received by Boynton on October 10, 2000. That evaluation included a rating of satisfactory overall, with satisfactory ratings in four of five evaluation subcategories, but a rating of "marginal" in the subcategory of communication. Petitioner's brief quotes two comments out of context regarding consulting her supervisor when she had questions, and the need to work together with other staff as part of a team. Those comments are virtually identical to comments made in evaluations which *predate* her complaint of harassment. The 1998 evaluation comments observed that "one of the weakest areas that really needs some improvement" is "communication with the Director of the GRC [Green River Center]," that she "also needs good communication with her fellow employees," and that "She also needs to participate in staff meetings." The evaluation was not markedly different from the previous evaluations. Brenda Boynton testified that she considered the earlier evaluations with the comments that she needed to improve communication and productivity, but was being given the benefit of the doubt while she learned the job, to be "borderline" evaluations. (Aplee. Supp. App. p. 40)

While the Petition emphasized that the October 10, 2000 evaluation is dated one day after the letter from Kelsey indicating he had been unable to determine

whether harassment had occurred, the Petition fails to explain that the timing of the evaluation was controlled by the fact that it was an *annual* evaluation due on a predetermined date, and that Boynton had chosen to make her complaint of the events allegedly occurring two years earlier, two weeks before the scheduled evaluation.

The Petition's summary of facts following the October 10, 2000 evaluation is incomplete and inaccurate. It is undisputed that during the period following the October 10, 2000 evaluation, supervisor Bussart received complaints from other employees at the Green River Center regarding Boynton's communications and failure to accomplish tasks. (Aplt. App. p. 61) In March of 2001, in accordance with College policy, Boynton was placed on an improvement plan designed to address the areas of concern. In June of 2001, supervisor Bussart recommended termination of Ms. Boynton. As provided by policy, President Boggs met with Boynton to review the recommendation and receive a response from her. Boggs found that the concerns regarding performance were significant, but he rejected the recommendation because he felt that the employee may not have been fully informed of the significance of the performance concerns.

President Boggs later reorganized the Green River Center, having the Center Director, Mary Ann Huebner, assume supervision of all custodians including Ms. Boynton, which eliminated Bussart from supervisory duties at the Green River campus. Boggs had previously worked closely with Ms. Huebner and considered her to be a nurturing supervisor. Huebner expressed her commitment to working with Brenda Boynton to help her succeed.

The Petition inaccurately asserts that the evaluations prepared during the time of Bussart's supervision were jointly "prepared by Bussart and Huebner." (Petition p. 10) There is nothing in the record to demonstrate that Huebner prepared the evaluations. Her role was that of Director of the Center. She simply sat in on the evaluation conference when Bussart met with the employee to outline job expectations, and did so because Boynton was performing those duties in the Green River Center.

Upon assuming responsibility for supervision of Boynton, Huebner met with her and developed a different plan of improvement aimed at addressing the areas of concern. At the end of six months, Huebner evaluated Boynton and found that her performance was deficient. Huebner noted her lack of communication with both administrators and fellow staff members, and failure to get the assigned work accomplished. Boynton had a number of excuses, particularly that she had not been properly trained. Because Huebner had not been the supervisor earlier and did not know if she had received proper orientation and training, she elected to establish another six-month plan of improvement, which included opportunity for training as well as direction regarding how to overcome ongoing issues of communication and productivity.

In the spring of 2002, Huebner met with Boynton, explained that Boynton had not met the plan and had actually gotten worse, and informed Boynton she had given Huebner no choice but to recommend termination. Huebner's recommendation to college President Boggs was based upon Boynton's performance during the period Huebner was supervisor. That recommendation went to President Boggs, who again invited Boynton to meet with

him to provide a response to Huebner's recommendation. Neither in any meeting with Huebner, nor with Boggs, did Boynton ever assert that her evaluations or the recommendation of termination were related to retaliation. Boggs noted that the issues first raised in the 1998 evaluation had not been resolved, but had gotten worse, and that the employee had been given multiple opportunities to improve. He recommended termination to the college Board of Trustees.

Brenda Boynton requested a formal hearing on the recommendation of termination as provided in college policy. The Board employed a retired state district court judge to act as an independent hearing officer to conduct a hearing and make a recommendation to the Board. While the Petition complains that none of the board members attended the hearing, that is exactly what is contemplated in the college's policy – an independent hearing conducted before an impartial hearing officer, separate from the Board.

The hearing process was conducted in accordance with Wyoming's statutory Administrative Procedures Act, which requires full trial-type proceedings, including representation by legal counsel, a right to discovery, subpoenas for witnesses, proceedings transcribed by a court reporter, calling and cross-examining witnesses under oath, opportunity for submission of proposed findings, etc. At the two-day hearing, for the first time Boynton raised the issue of alleged retaliation. Petitioner testified and presented argument regarding the alleged retaliation.

At the conclusion of the hearing, after reviewing the record, the independent hearing officer concluded that termination was justified for the performance problems.

He considered Petitioner's argument that the termination was based on retaliation, but he found there was no evidence of retaliation and the reasons given were legitimate reasons to pursue a termination.

Upon receipt of the recommendation of the independent hearing officer, the Board of Trustees conducted its own review of the record. The Board hired separate legal counsel to advise them regarding the process and to assist in drafting a decision once it was reached. The Board read the entire record, the proposed findings from the parties, and the recommendation of the hearing officer. After deliberation, the Board voted to terminate employment based upon the same reasons set forth in the findings and recommendation of the independent hearing officer.

The Petition does not make it clear that in the reorganization, when Huebner assumed responsibility for supervision, Bussart then ceased to have any input into the supervision or evaluation of Boynton. Bussart had no part in Huebner's recommendation for termination. He did not know it was occurring and he was not called as a witness by either side at the hearing on her termination.

Boynton's original complaint named both custodial supervisor Bussart and College President Boggs in their individual capacities. A motion for summary judgment was filed on their behalf arguing that the decision to terminate occurred with the hearing officer and the Board's independent review of the evidence and recommendation. Further, it was argued that Boynton had testified that she had always been treated professionally and appropriately by the President, that she had no evidence that he was influenced by a desire to retaliate, and that if he believed Huebner's evaluation, it would have been appropriate for

him to recommend termination. Likewise, it was argued Boynton testified that she was not aware of any evidence that Bussart had been involved in Huebner's recommendation, and that the termination was based on events occurring while Huebner was supervisor. In response to the motion for summary judgment, Boynton conceded the motions for Bussart and President Boggs, but argued that her sole remaining claim against the college as an entity should go to trial.

## II. PROCEDURAL BACKGROUND

Plaintiff filed a complaint in the District Court for the District of Wyoming alleging unlawful retaliation and naming college President Tex Boggs, custodial supervisor Gary Bussart, and Western Wyoming College as defendants. After discovery, all three defendants submitted motions for summary judgment. Those motions argued that Petitioner had failed to demonstrate causation between the protected activity and the adverse employment action and had failed to demonstrate that the reasons reached by the independent hearing officer and the Board were pretextual. Petitioner conceded the motions of Defendants Bussart and Boggs, but contended that a trial should go forth on the claim against the Defendant College.

The District Court granted summary judgment on the remaining claim against the college. The court concluded causation was not demonstrated based on the fact that the supervisor making the recommendation had no knowledge of the protected activity *and also* because of the overall evidence, including the fact that the decision to terminate

was made on the evidence at a hearing, reviewed by an independent hearing officer and the Board.

Petitioner appealed the District Court order granting summary judgment. On December 3, 2004, the Tenth Circuit, in an unpublished opinion, affirmed the District Court decision both that the element of causation was not demonstrated and that the Petitioner failed to provide evidence to demonstrate that the reasons given were pretextual. On December 13, 2005 Petitioner filed a Petition for Re-hearing with Suggestion of Re-hearing *En Banc*. The Petition for Re-hearing was denied November 29, 2005. An Order Granting Extension of Time to File a Petition for Writ of Certiorari was issued extending the time to file a Petition to June 5, 2006.

## ARGUMENT

### I. THE PETITION FAILS TO ADDRESS THE ALTERNATIVE BASIS FOR GRANTING SUMMARY JUDGMENT – THAT PETITIONER COULD NOT DEMONSTRATE THAT THE EMPLOYER'S NON-DISCRIMINATORY REASONS WERE PRETEXTUAL.

Both the District Court and the Tenth Circuit sustained the grant of summary judgment on the dual bases that causation was not shown, and that the Petitioner failed to demonstrate the reasons given were pretextual. The grant of summary judgment can and should be sustained on the basis that Petitioner failed to provide evidence that the college's non-discriminatory reasons were pretextual. There is no need to even reach Petitioner's arguments regarding the causation element.

The Tenth Circuit summarized: "The Court also determined that Boynton failed to demonstrate that WWCC's reasons for terminating her were pretextual. . . . We agree. . . ." The Petition essentially ignores this finding. Other than a single paragraph at page eleven of the Petition very loosely referencing a few of the detailed findings entered by the Board, and the assertion that the reasons are "trivial," Petitioner fails to make any serious argument that the reasons found by the independent hearing officer and written into express formal findings by the Board are pretextual. The outside independent hearing officer – a retired state court judge – found the reasons to be serious and good cause for termination, as did the Board. A review of the reasons given, most of which Petitioner does not dispute, demonstrates legitimate non-discriminatory reasons for termination.

The following are some examples from the official College Board findings which the Petitioner conceded were valid:

> ¶ 23. Boynton, on multiple occasions, demonstrated an inability to consistently discharge work duties in the absence of constant close supervision and exercised poor judgment in the performance of her job duties. She failed to clean a bathroom with urine covering toilet paper, walls and floor because of an invalid concern about overtime. She failed to disengage a faulty fire alarm system, requiring students and staff to stand outside in winter weather while cleaning a smoke detector head when it was apparent there was no fire in the gymnasium.

Petitioner wrote an email documenting that "it looks and smells like someone urinated all over the wall, toilet

paper and floor in the handicapped stall of the downstairs men's room. Now my souls (sic) smell bad and are sticky because I had to walk through it." (Aplee. Supp. App. p. 51) Although Boynton admitted she could have secured permission to stay at the end of her shift to clean it up, she chose to leave it overnight, risking that persons arriving in the morning could be exposed to a health hazard. (Aplee. Supp. App. pp. 51-52) She likewise testified that when the fire alarm went off she checked to determine there was no fire in the gymnasium, but left everyone out in the cold while she got a ladder and climbed up to clean the dirty sensor. (Aplee. Supp. App. pp. 54-55)

> ¶ 24. After working at the Green River Center for three years, Boynton did not or would not learn how to run the snow plow, truck and sander equipment used to clean the roadway entrance to the center. The failure on the part of Boynton to learn her duties resulted in dangerous and slick conditions and resulted on occasion in cars running off the road and patrons being denied access to activities. Boynton either refused or was unable to follow directions given. Boynton's testimony reflected she did not follow supervisor instructions to place dry sand at the front of the sand hopper so sand at the rear could dry. This caused her to use wet sand, making it impossible to operate the sander; Boynton showed a complete inability to remove the snow from the roadway entrance and sand the hill. . . .

Petitioner testified that snow removal was a part of her job, that she was shown how to use the equipment, that she never had success trying to sand the hill, that others felt the hill was slick, and that she didn't dispute that the other custodian/maintenance person was able to

use the equipment successfully on each occasion when she couldn't. (Aplee. Supp. App. pp. 49-51)

> ¶ 26. Boynton refused to perform her security related assigned duties. She was unwilling or unable to adequately supervise unruly children during ballet and hunter safety classes at the Center. She was unable or unwilling to control high school students using the college computers to find pornography on the internet, skateboarding or otherwise engaging in disruptive conduct at the Center. Boynton refused to assume responsibility for security despite the fact that she was clearly assigned responsibility for security by her position description.

Boynton admitted security was part of her duties, that there were problems with students using computers to access pornography and students being disruptive in the halls. (Aplee. Supp. App. pp. 49, 52, 53) She admitted supervisor Huebner instructed her to first tell them to stop, then to tell them to leave the campus if they were noncompliant, and then, if necessary, to call the police. Boynton refused to follow the instructions, saying she couldn't be that mean. (Aplee. Supp. App. pp. 52-53) She admitted she did not respond to security alarms and failed to discuss with her supervisor why she did not respond. (Aplee. Supp. App. p. 34)

It was undisputed that Petitioner had substantial problems with a negative, insubordinate attitude toward her supervisors. The District Court observed that her own deposition demonstrated that she had "substantial disdain for the authority of her supervisor and demonstrated a non-compliant, defiant attitude unquestionably detrimental to her future employment prospects at WWCC." (Dist.

Ct. Order p. 16) As an illustration, the District Court noted:

> By way of example only, Boynton was advised to keep a log of her daily activities by her supervisor as a part of her remediation plan. In her deposition she admits that she kept the logs on paper napkins, paper towels, or toilet paper and could not be bothered to find an alternative means of recording her activities and she 'was not going to provide a notebook for them.' Deposition at 157. This is in stark contrast to her deposition testimony indicating that she kept a notebook regarding her complaints, incidents and disputes with individuals at the college. In the log, for example, Plaintiff notes that she is on a 'pee break'; recorded that between 9:09 and 9:14, she 'readjusted bra strap (rt)' and between 6:12 and 6:16 pm January 16, 'good healthy crap.'

(Dist. Ct. Order p. 16)

While the termination was pending, an incident occurred where Boynton was instructed by Huebner to clean mouse droppings off Huebner's desk. Boynton did not do so and insisted Huebner remove everything from her desk before she would clean it, although Huebner specifically instructed her and gave her permission to clean the desk. Huebner then suspended Boynton without pay for a period of 24 hours (three 8 hour shifts) for insubordination. (Dist. Ct. Order p. 7)

The reasons given by the Board were based on the extensive sworn testimony in the record, particularly Boynton's own testimony. The retired state court judge acting as an independent hearing officer found the reasons for termination worthy of belief, as did the Board. It would be very legitimate for an employer to be concerned that a

custodian left a urine soaked bathroom for someone else to clean another day. There is nothing trivial about repeated unwillingness or inability to keep the entrance and parking lot clear of snow and sanded for safety. Refusing to follow instructions regarding issues like students viewing pornography and disrupting Center activities are significant issues. Likewise, not responding to security alarms and not talking to supervisors about the failures to respond are serious problems.

In addition to the findings quoted, there are additional other significant performance issues set forth in the findings. Neither at the District Court level nor at the Tenth Circuit has the Petitioner ever explained why the specific findings of the Board are unworthy of belief. Instead, Petitioner has relied entirely on Petitioner's subjective, self-serving, opinion expressed in her affidavit that *she* does not consider the reasons given adequate to justify termination. Nevertheless, the hearing officer and the Board both found them to be valid reasons and there is no evidence in the record to suggest that in doing so either the hearing officer or the Board did not believe what they wrote in their findings, but were only using those reasons as a pretext for a hidden motive to retaliate.

Where the employer relied on legitimate reasons for the termination, the claim fails. Because Petitioner did not demonstrate that the legitimate reasons given by the employer were pretextual, the summary judgment must be upheld. *McDonnell-Douglas v. Green*, 411 U.S. 793 (1973).

## II. THE PETITIONER'S ARGUMENTS REGARDING THE LEVEL OF SCRUTINY OF CAUSALITY AND THAT SUMMARY JUDGMENT SHOULD BE GRANTED ONLY UPON THE TOTALITY OF THE CIRCUMSTANCES ARE INAPPLICABLE TO THESE FACTS.

The arguments advanced by Petitioner, regarding the level of scrutiny on summary judgment and that courts should look to the totality of the circumstances rather than "discrete facts," are not applicable to the facts or the actual reasoning applied in this case. As to the level of scrutiny, Petitioner outlines a purported difference of view between the circuits as to whether there should be some form of heightened level of scrutiny "where evidence of discrimination is necessarily indirect and inferential." (Petition, p. 19) Assuming *arguendo* that some circuits may not acknowledge or accept the fact that evidence may be indirect or circumstantial in discrimination cases, those holdings do not apply to this case. The District Court did consider what inferences might be drawn from the facts, including Petitioner's argument that an inference could be drawn on "temporal proximity." Likewise, whether the evidence should be viewed based on discrete factors or on a "totality of the evidence" basis cannot be resolved in this case because the District Court used both approaches.

In reaching its decision on causality, the court noted that the recommendation for termination originated with Huebner, who did not know that Petitioner had engaged in protected conduct of complaining about sexual harassment. In argument to the District Court, Petitioner contended Huebner did not know, arguing Huebner "was never informed Boynton had turned Bussart in to the College for bizarre gender-related behavior. . . ." (Aplee.

Supp. App. p. 87; Plaintiff's Response to Defendant's Motion for Summary Judgment, p. 28) The District Court accepted the undisputed fact that the supervisor recommending the termination did not know of the protected conduct, and reasoned that the supervisor could not have been retaliating for something she did not know.

On appeal to the Tenth Circuit, the Petitioner changed the argument to contend that because other College officials knew of the complaint, some inference should be drawn that Huebner could have also known, despite Petitioner's earlier argument to the District Court that she did not know and despite the testimony of all witnesses that Huebner was not informed. Petitioner's complaint is that the Circuit Court's consideration of Huebner's lack of knowledge is focusing on "discrete" items. Such an argument defies common sense and the well established law of multiple circuits. *Peterson v. Utah Department of Corrections,* 301 F.3d 1182, 1188 (10th Cir. 2002). It is self-evident that Huebner was not retaliating against Petitioner for actions Huebner did not know about.

The Petition makes now a *third* different argument, namely that there was knowledge of the protected activity by the Board, since the Petitioner injected such an argument into the record of the hearing before the independent hearing officer. Petitioner contends that the District Court erroneously looked only at the "discrete" fact that Huebner, who recommended termination, didn't know of the protected activity.

The argument misstates the District Court's decision and its reasoning. The District Court indeed found that there could be no inference of discrimination by Huebner

where it could not be established that she knew a protected act had even occurred. However, the District Court also analyzed the evidence in its totality, concluding Petitioner could not establish causation on the evidence as a whole. The District Court's opinion relied on the three-year lapse between her allegation and the termination, the fact the College President actually rejected Bussart's recommendation of termination and reassigned supervision to Huebner, the fact that Huebner did not know of the protected conduct, the fact Boynton "offers no evidence that she was in fact complying with the employer's expectations of improved job performance pursuant to numerous remediation plans," that Boynton's own deposition testimony demonstrates "a non-compliant, defiant attitude," and the fact that the termination occurred after "a full hearing" before the administrative hearing officer, and review of the record by the College Board.

The District Court looked at *all* of the evidence, and judging it in totality, found "there is no evidence whatsoever to permit any reasonable inference that there was any causal connection between Boynton's complaints to President Boggs in September 2001 and her termination . . . *All* of the evidence suggests that Boynton's termination was for unsatisfactory performance of her job duties." (Dist. Ct. Order p. 15, emphasis added) The District Court found no evidence of causation both when analyzing from the viewpoint of the recommending supervisor who didn't know of the protected activity, and when analyzing the evidence as a whole, particularly the decision of the independent hearing officer and the Board.

It is actually the Petitioner who is attempting to isolate discrete facts and ignore the totality of the evidence. The Petitioner places great emphasis on the fact

that the day after Dean Kelsey wrote Petitioner that he had investigated her complaint and was unable to resolve the conflict between her information and the testimony of others, that Petitioner received an evaluation which rated her as "marginal" in one of five subcategories. Petitioner asks the courts to focus on that discrete item, ignoring the context and all other intervening events. Petitioner's narrow focus disregards the fact that the evaluation was very similar to evaluations received prior to the protected activity. It disregards the fact that there was not a continuous pattern of adverse action, but rather the College President instead rejected the first recommendation of termination and assigned a new supervisor who had no knowledge of the protected conduct. It disregards the fact that Petitioner failed to complete two more improvement plans under Huebner's supervision, and that Petitioner did have significant performance problems and conflicts with Huebner while under her supervision. It ignores the fact that Petitioner did not raise any complaint of retaliation either to Huebner or President Boggs when the recommendation was being formulated and reviewed. Most of all, it ignores the fact that Bussart had absolutely nothing to do with either the events or the process that led to her termination, and that the decision was made by the hearing officer and the Board after a full and fair opportunity for Petitioner to present her arguments regarding retaliation.

The District Court decided this case entirely consistent with *Celotex v. Catrett,* 477 U.S. 317 (1986). *Celotex* held that:

> The plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a

> party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be 'no genuine issue as to any material fact,' since a complete failure of proof considering an essential element of the nonmoving party's case necessarily renders all other facts immaterial. *Id.* at 318.

The District Court's decision does not raise any issue of a split in the circuits. Petitioner argues that there is a difference between the Seventh, Eighth and Eleventh Circuits. Petitioner argues that the Eighth Circuit holds that summary judgment "should be used sparingly in the context of . . . [a] retaliation case . . . " and that courts should " . . . exercise particular caution when examining the factual question of intent . . . " *Wallace v. DTG Operations, Inc.*, 442 F.3d 1112 (8th Cir. 2006) (quoted at page 18 of the Petition). Petitioner argues that the Seventh Circuit uses a standard of "added vigor" in reviewing motions for summary judgment in discrimination cases, citing *Alexander v. Wisconsin Department of Health*, 263 F.3d 673, 681 (7th Cir. 2001). (Petition p. 18) Petitioner seeks to contrast that language to the Eleventh Circuit which Petitioner characterizes as no special caution being required. However, this case arises in the Tenth Circuit, and Petitioner fails to demonstrate that the Tenth Circuit applied any incorrect standard. Even more importantly, the Petition fails to demonstrate how application of any of the allegedly more strict standards for summary judgment voiced in some circuits would change the outcome of this case.

The District Court properly applied the summary judgment standard. It took the position that it would

consider there to be a genuine issue of material fact if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. Likewise, it took the position that "The factual record and reasonable inferences therefrom are construed in the light most favorable to the nonmovant." (Dist. Ct. Order p. 2) The District Court did agree with Petitioner's argument that "Temporal proximity between protected activity and adverse action may . . . support an inference of causation." (Dist. Ct. Order p. 15) However, the Court noted that proximity alone is insufficient where there is a "three year period" between the complaint and the termination, where the person making the termination recommendation did not know of the complaint and where the actual termination decision was based on the recommendation of an independent hearing officer. (Dist. Ct. Order pp. 15-16) Under those circumstances the District Court found, "Boynton must provide other evidence of retaliatory motive if her claim is to survive summary judgment." (Dist. Ct. Order p. 16) The only evidence Petitioner has presented of retaliatory intent is the argument that there was a temporal proximity between her complaint about Bussart and an evaluation of her as marginal in one subcategory of the next evaluation she received from Bussart. Petitioner's arguments about proximity fail to deal with the absence of any evidence, direct or indirect, to demonstrate that Ms. Huebner, who made the recommendation, or the hearing officer and Board, who made the final decision, had retaliatory motives. At most, Petitioner presents an argument which might arguably create an inference of possible retaliation by Mr. Bussart, but he was removed as her supervisor, and had no input into the recommendation or the final decision. Even granting all the inferences to the Petitioner, there is no evidence from which to infer that

Ms. Huebner, the hearing officer, or the Board were motivated by retaliation.

Petitioner has never articulated any reason why an independent hearing officer would have a motive to retaliate against the Petitioner because of her sexual harassment complaint to President Boggs three years earlier. While the hearing officer was exposed to the Petitioner's evidence and argument regarding her contention that the termination was retaliation, there is no evidence or argument that would give rise to an inference that the hearing officer was retaliating when he rendered his advisory findings of fact and recommendation.

There is no basis on which to draw an inference of a retaliatory motive by the Board who accepted the findings of good cause to terminate issued by the independent hearing officer. As the District Court noted, "Boynton has provided no evidence whatsoever as to retaliatory motive other than her own speculation and belief to support her claim of retaliation. Her own subjective opinions are not sufficient." (Dist. Ct. Order p. 16)

While there are circumstances where it might be shown that a manager was simply carrying out the unreviewed recommendation of a biased subordinate, and it might be proper to impute the subordinate's motive to the employer, that is not the case here. Petitioner suggests such a "cat's paw" argument, citing *Stimson v. City of Tuscaloosa,* 186 F.3d 1328, 1332 (11th Cir. 1999). However, the "cat's paw" argument imputing a motive does not apply where there is an intervening independent investigation of the complaints against the employee. *Id.*; *English v.*

*Colorado Department of Corrections*, 248 F.3d 1002, 1010-1011 (10th Cir 2001); *Willis v. Marion County Auditor's Office*, 118 F.3d 542, 547 (7th Cir. 1997).

Moreover, the Petitioner has never reconciled conceding the motion for summary judgment on behalf of Defendants Bussart and Boggs with its position regarding liability of the college. When faced with a motion that Bussart had no input into the termination recommendation and that neither Bussart nor Boggs made the termination decision, the Petitioner conceded the motion. Despite having conceded that Bussart had no input into the actual termination and that Boggs likewise was not responsible because the actual decision was made by the Board, Petitioner nonetheless persists in basing its factual and legal arguments on actions of Bussart.

A plaintiff cannot meet her burden by "merely asserting that a jury might and legally could disbelieve" the employer's testimony. *Anderson v. Liberty Lobby,* 477 U.S. 242 (1986). The plaintiff is obligated to "present evidence from which a jury might return a verdict in his favor." *Id.* The District Court and the Tenth Circuit both applied the appropriate standard and concluded that no reasonable jury could find retaliation based on the materials before the courts.

The Petitioner argues that summary judgment in discrimination and retaliation cases is being abused or overused. While that may occur in some instances, summary judgment should not be viewed as some form of illegitimate legal activity. "Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and

inexpensive determination of every action.'" *Celotex, supra* at 328.

There may very well be room for additional refinement of the rules for summary judgment, possibly including the issues raised in the scholarly articles quoted in the Petition. However, those issues are not present in the facts of this case. This case does not present any opportunity to define those principles further, because regardless of which of the allegedly different approaches is taken, the outcome will be the same due to the overall failure of proof. None of the approaches in use by any of the circuits would deny summary judgment in a context where there is literally no evidence that the decision maker – the hearing officer and the Board – retaliated.

## III. THE PETITION FOR CERTIORARI SHOULD BE DENIED

The Petition for Certiorari should be denied because:

1. Petitioner failed to address the alternative basis for summary judgment that Petitioner did not demonstrate that the employer's legitimate proffered reasons were pretextual. Summary judgment should be affirmed on that basis in any event.

2. Petitioner's argument regarding whether the courts should look at "discrete facts" or the totality of evidence is inapplicable because the District used both approaches.

3. Due to a complete failure to provide evidence that the hearing officer and Board were motivated by retaliation, Petitioner's arguments that the circuit courts have differed on the precise standard of review is inapplicable

because summary judgment was appropriate under any of the summary judgment formulations.

4. The legal arguments advanced in the Petition do not correspond to the facts and reasoning actually used by the courts below, making this a poor case to attempt to consider the legal issues surrounding summary judgment standards which Petitioner is attempting to raise.

## CONCLUSION

For the reasons set forth, the Petition for a Writ of Certiorari should be denied in its entirety.

Respectfully submitted,

PATRICK E. HACKER
PATRICK E. HACKER, P.C.
2515 Pioneer Avenue
Cheyenne, Wyoming 82001
307-778-8844
*Attorney for Respondent*
*Western Wyoming*
*Community College*